SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 561

THE COCA-COLA COMPANY,
Petitioner,

vs.

DIXI-COLA LABORATORIES, INC., ROBERT W. KRUSE, CONSTANTINE GRIVAKIS, WILLIAM H. HENNEN, ROY GOBRECHT, MARTIN FOX, JACK J. STREGER AND ALFRED O'NEIL, MARBERT PRODUCTS, INC., AND APOLA EXTRACT AND SYRUP CORPORATION.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

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Defendants-Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner, The Coca-Cola Company, plaintiff in the District Court, appellee below, respectfully prays that a writ of certiorari issue to the United States Circuit Court of Appeals for the Fourth Circuit to review judgments of that

Court entered on January 11, 1941,[1] (OR.[2] 2159, reported 117 Fed. (2d) 352), and on February 4, 1946 (NR.[3] 444, reported 155 Fed. (2d) 59), modifying an interlocutory decree of the United States District Court for the District of Maryland in favor of petitioner (31 Fed. Supp. 835, OR. 1532).

Jurisdiction

The jurisdiction of this Court to grant the writ of certiorari to review the decision and judgment is given by the following statutes:

1. This suit was instituted under U. S. Code, Title 15, Sections 96, 97 and 99, and under U. S. Code, Title 28, Section 41, Subdivision 1.

2. U. S. Code, Title 15, Section 98, provides for granting writs of certiorari by this Court for the review of suits instituted under U. S. Code, Title 15, Section 97, in the same manner as is provided by U. S. Code, Title 28, Section 347; and U. S. Code, Title 28, Section 347, provides for granting of writs of certiorari by this Court for reviewing of suits instituted under U. S. Code, Title 28, Section 41, Subdivision 1.

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[1] Certiorari to interlocutory decree denied, 314 U. S. 629.

[2] Refers to page number in the record previously filed in this Court by The Coca-Cola Company in No. 1039, October Term, 1940, later No. 87, October Term, 1941 (314 U. S. 629), following the interlocutory decree in furtherance of its petition for writ of certiorari to the Circuit Court of Appeals, following the decree of that Court in No. 4672 (117 Fed. (2d) 352).

[3] Refers to page number in the new record filed in this Court following accounting and final decree of the District Court upon cross-petition of *The Coca-Cola Company* v. *Dixi-Cola Laboratories, Inc.*, for petition of writ of certiorari to review the decision of the Circuit Court of Appeals, No. 5431 (155 Fed. (2d) 59).

Time for making application for certiorari extended until October 2, 1946, by Chief Justice Vinson (NR. 464).

Summary and Short Statement of the Matter Involved

Petitioner, a Delaware corporation, has sold its beverage and syrup under the trade-mark "Coca-Cola" since 1886. "Coca-Cola" was registered as a trade-mark under the Act of 1881 [4] and under the Act of February 20, 1905,[5] as amended.

Defendants merchandised a single product under various names, including "Apola Cola", "Dixi-Cola", "Lola Kola", "Marbert Cola", and "Kola", with the knowledge that applications to register "Dixi-Cola" and "Apola Cola" were denied by the Patent Office (OR. 437; 840). The use of these names was accompanied by other unfair acts, such as the simulation of the colors red and white (OR. 1047), long associated with petitioner, and the active efforts on the part of defendants' officers to induce their dealers to pass off defendants' product for plaintiff's product (OR. 141-170).

The District Court held that the validity of the trade-mark "Coca-Cola" is no longer open to question and that the registrations thereof are valid (OR. 1534; 1550).

The court below concurred in this conclusion of the District Court and said: "Plaintiff is the owner of the trade-mark 'Coca-Cola' . . . (OR. 2159). It is certainly beyond dispute that the word 'Coca-Cola' is the exclusive property of The Coca-Cola Company (OR. 2162), and that the name 'Coca-Cola' identifies the goods of the plaintiff (OR. 2168). The evidence in the pending case shows that what was said of the name in Coca-Cola Co. *v.* Koke Co., 254 U. S. 143, and Coca-Cola Co. *v.* Old Dominion Beverage Corp., supra, (271 Fed. 600) is equally true today," (OR.

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[4] Act of March 3, 1881, C. 138, 21 Stat. 502.

[5] Act of February 20, 1905, C. 592, Secs. 1-20, 33 Stat. 724-731, U. S. C. Title 15, Secs. 81-109.

2162) and that the plaintiff was entitled to the issuance of an injunction against the defendants "from committing any acts calculated to cause any product other than the plaintiff's to be known and sold as 'Coca-Cola', or 'Koke', or any colorable imitation thereof" (OR. 2174).

In *The Coca-Cola Co.* v. *Koke, supra,* this Court said:

> "It appears that after the plaintiff's predecessors in title had used the mark for some years it was registered under the Act of Congress of March 3, 1881, c. 138, 21 Stat. 502, and again under the Act of February 20, 1905, c. 592, 33 Stat. 724" (p. 145).
>
> "Whatever may have been its original weakness, the mark for years has acquired a secondary significance and has indicated the plaintiff's product alone" (p. 145).
>
> "The name now characterizes a beverage to be had at almost any soda fountain. It means a single thing coming from a single source, and well known to the community. It hardly would be too much to say that the drink characterizes the name as much as the name the drink. In other words Coca-Cola probably means to most persons the plaintiff's familiar product to be had everywhere rather than a compound of particular substances" (p. 146).

The District Court found the fact to be that the use of the names "Dixi-Cola", "Apola-Cola", "Marbert Cola", "Lola Kola", and "Kola" was calculated and intended to deceive, and did and does actually deceive members of the public into the belief that defendants' said drink is merchandise emanating from the plaintiff" (OR. 1548; Finding of Fact No. 6).

The District Court also found that these acts of the defendants were committed "with the deliberate intent and purpose of appropriating plaintiff's good will and causing defendants' product to be sold by the trade, and accepted

by the consuming public, as and for plaintiff's product, . . . " (OR. 1550).

The court below did not disturb these findings, but itself found that "the evidence also justifies the finding that the bottled beverage made by bottlers from defendants' concentrate was passed off as Coca-Cola at various bars and taverns" (OR. 2174), and that there is some evidence that "an officer of the corporation encouraged the practice" (OR. 2174), and that ". . . the defendants had conspired with their customers to palm off their goods for those of The Coca-Cola Company whenever it was safe to do so." (OR. 2174)

The District Court enjoined the defendants' illegal acts, including the use of the names "Dixi-Cola", "Marbert Cola", "Lola Kola", "Apola Cola", and "Kola". The injunctive relief followed the finding of fact by the District Court that "the use of said names was calculated and intended to deceive, and did and does actually deceive, members of the public into the belief that Defendants' said drink is merchandise emanating from the Plaintiff." (OR. 1548; Finding of Fact No. 6).

Although the Circuit Court of Appeals affirmed the findings of the District Court that it was the intention of the defendants to cause their goods to be passed off for the goods of the plaintiff, and that they conspired with their customers so to do, the court below modified the injunction by eliminating from the operation thereof the words "Marbert Cola" and "Dixi-Cola," and "Kola" (OR. 2175).

The effect of this modification was to nullify the finding of fact upon which the District Court granted injunctive relief, although there was ample evidence to support that finding, and to disregard Subsection (a) of Rule 52 of the Federal Rules of Civil Procedure (28 U. S. C. A., Sec. 723 (c)).

The court below rested its decision upon the question whether the trade-mark "Coca-Cola" was fanciful in its origin or whether it derived its trade-mark significance through acquiring a secondary meaning.

Such a distinction is in conflict with the decisions of this Court, and pins the decision of the court below upon an erroneous conception of the law.

The Questions Presented

(1) Whether the Circuit Court of Appeals is at liberty, under Rule 52 (a) of the Federal Rules of Civil Procedure, to set aside the judgment of the lower court where such judgment is based upon a finding of fact that is supported by ample and substantial evidence.

The decision of the Court is in conflict with the decisions of other circuits wherein it is held that upon review in an equity case the Circuit Court of Appeals is without power to deal with the evidence *de novo,* and is, upon issues of fact, limited to a consideration of the question as to whether the District Court's judgment is supported by substantial evidence. On this question there is a conflict in the circuits.

Webb v. *Frisch* (CCA 7), 111 Fed. (2d) 887, 888, and *Adventures in Good Eating, Inc.,* v. *Best Places to Eat, Inc.,* (CCA 7), 131 Fed. (2d) 809, 814, hold that an appellate court may not review the facts found by the lower court *de novo* on appeal, but must accept the findings of the lower court if supported by substantial evidence.

(2) Whether the trade-mark registered under the Trade-Mark Act of 1905, as amended, is a technical trade-mark and is entitled to full protection against its use or the use of colorable imitations, and whether the Court may, as a matter of law, refuse to grant full relief merely because

such mark is not fanciful and did not originate out of a fancy name.

Reasons for Granting the Writ

(1) The court below so far departed from the accepted and usual course of judicial procedure as to call for the exercise of this Court's power of supervision, in that it failed to follow Rule 52 (a) of the Federal Rules of Civil Procedure by, in effect, nullifying findings of fact of the District Court which are highly material and not clearly erroneous.

(2) The decision of the court below is in conflict with *Davids* v. *Davids,* 233 U. S. 461, and *Armstrong* v. *Nu-Enamel,* 305 U. S. 315, wherein this Court held that a trade-mark registered under the Act of 1905 is a valid technical trade-mark and as such is entitled to full protection. The decision in this case is in conflict with the decisions of other Circuit Court of Appeal. It is specifically in conflict with the following cases: *Platen* v. *Gedney* (CCA 2), 224 Fed. 382; *Warner Bros. Co.* v. *Wiener* (CCA 2), 218 Fed. 635; *Henderson* v. *Peter Henderson & Co.* (CCA 7), 9 Fed. (2d) 787.

Conclusion

It is believed that the importance of the review by this Court of the decision of the Circuit Court of Appeals cannot be over-estimated, inasmuch as the courts, the bar, and the owners of trade-marks will be in a state of confusion as to the law of trade-mark infringement and unfair competition, and the public will be constantly deceived by colorable imitations of well established trade-marks unless and until the law with respect to trade-marks and unfair competition is again restored to a settled state by this Court.

WHEREFORE, your petitioner prays that a writ of certiorari be issued out of and under the seal of this Court, directed

to the United States Circuit Court of Appeals for the Fourth Circuit, commanding the said Court to certify and send to this Court, on a day to be designated, a full transcript of the record and all proceedings of said Circuit Court of Appeals in the case numbered and entitled on its docket number 4672, *Dixi-Cola Laboratories, Inc.; Robert W. Kruse, Constantine Grivakis, William H. Hennen, Roy Gobrecht, Martin Fox, Jack J. Streger and Alfred O'Neil, Marbert Products, Inc., and Apola Extract and Syrup Corporation, Defendants-Appellants,* v. *The Coca-Cola Company, Plaintiff-Appellee,* to the end that this case may be reviewed and determined by this Court; that the judgment of the said Circuit Court of Appeals for the Fourth Circuit be reversed insofar as it modified the judgment of the District Court upon interlocutory decree; and that petitioner be granted such other and further relief as to this Honorable Court may seem meet and proper.

And your petitioner will ever pray.

THE COCA-COLA COMPANY,
By JOHN A. SIBLEY.

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